Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOHN KELLY — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S CLAIMS.

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OPINION BELOW

The opinion of the Kentucky Supreme Court is correctly set forth in slip form in the petitioner's Appendix to his petition.

JURISDICTION

Respondent contests petitioner's assertion that this Court has jurisdiction over petitioner's petition under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent contests petitioner's listing of federal constitutional and statutory provisions as wholly inappropriate in this case.

COUNTERSTATEMENT OF THE CASE

The petitioner, John Kelly, was convicted in the Franklin Circuit Court of complicity to theft by deception and was fined $2,500.00. A third co-defendant, Ward Burnett, was convicted of theft by deception and fined $5,000.00. A second co-defendant, John Wolf, was also convicted of complicity to theft by deception and fined $5,000.00 Petitioner and his co-defendants appealed as a matter of right to the Kentucky Court of Appeals. The Kentucky Court of Appeals reversed the convictions. Respondent subsequently requested the Kentucky Supreme Court to grant discretionary review of the decision of the Court of Appeals. The Kentucky Supreme Court

granted discretionary review and reversed the decision of the Court of Appeals, reinstating petitioner and his co-defendants' convictions. That opinion is reported at 875 S.W.2d 865. The Kentucky Supreme Court denied petitioner's petition for rehearing.

Petitioner has now filed a petition for a writ of certiorari to the Kentucky Supreme Court.

COUNTERSTATEMENT OF THE FACTS

In July, 1987, J. D. Wolf was employed as Director of Livestock and Sanitation by then Kentucky Agriculture Commissioner David Boswell. Wolf took an extended leave of absence from September 1987 to the end of Boswell's term in January 1988. At that time Ward Burnette was a candidate for Agriculture Commissioner and in November 1987 was elected to that post. He was to take office January 4, 1988. Wolf was working on Burnette's transition team.

During Wolf's leave of absence, he "had no official function with the Department of Agriculture." He had no duties or responsibilities and specifically had no authority to authorize any plane flights for himself or others. The only two people in the Department who had such authority were Commissioner Boswell and Deputy Commissioner John Heflin.

On December 10, 1987, Wolf contacted Bruce Harper. Harper was Kentucky Governor-elect Wilkinson's farm manager and had assisted Wilkinson on agriculture related issues. Wolf asked Harper to make arrangements for two plane flights on December 14 and 15 to Chicago, Illinois and Washington, D.C. Harper called Angela Hicks at Wilkinson Flying Service to set up the two flights. Hicks was in charge of bookkeeping and chartering flights for Wilkinson Flying Service. He told Hicks to send the bill to the Department of Agriculture. He said to date the bill after

the first of the year because the Department of Agriculture would not pay for the flights if they occurred in December. He told her to list the dates of the flights as January 4 and 5 instead of December 14 and 15. Hicks made out two separate invoices and mailed them to Wolf at the Department of Agriculture.

On December 14, Wolf, Burnette, Harper and Harold Duckworth, a Kentucky farmer, flew to Chicago, Illinois. According to the group, they met with officials of the American Haytech Corporation to discuss hay cubing and the possibility of Haytech locating a plant in Kentucky. These same four flew to Washington, D.C. on December 15 to meet with officials of the Federal Department of Agriculture.

In late January of 1988, Angelina Bennett at the Department of Agriculture received a bill from Wilkinson Flying Service for the two plane flights. Bennett was an administrative specialist whose duties included paying bills. The dates on the bill caught her

attention because the date one of the flights supposedly was taken coincided with the same day Burnette was in Frankfort, Kentucky being sworn in as Agriculture Commissioner. Bennett brought this to the attention of Assistant Director of Administrative Services John Moore. Bennett also told Burnette's secretary she was not sure the Department of Agriculture could pay the bill.

Moore agreed with Bennett that the bill should probably not be paid. He took the bill to Wolf. Wolf laughed and told Moore he would take care of the bill. Moore talked to Wolf several times concerning the bill. During one of these conversations Burnette was standing nearby. Burnette told Moore the trips were a "celebration" for winning the election. No mention of any "hay program" occurred in these conversations. At one point Burnette told Moore the bill had gone to Rogers Wells' office and was now on Burnette's desk. Wolf described the bill as a "hot potato."

Wolf and Burnette arranged a meeting with Rogers Wells, the Kentucky Secretary of Finance and Administration. Burnette asked Wells if Wells could help him get the bill paid. Burnette told Wells the bill was from Wilkinson Flying Service, but said the plane did not actually belong to Wilkinson Flying Service. Burnette maintained the trips were state business but he did not reveal the dates of the trips. Wells told Burnette he would look into the situation.

Wells gave the bill to petitioner John Kelly. Petitioner was one of Wells' assistants in the Kentucky Finance Cabinet. Wells told petitioner the state could not pay for any flights on Wilkinson planes. He told petitioner to pay the bill if it needed to be paid and if it should not be paid, reject it.

Petitioner called Angela Hicks at Wilkinson Flying Service. Petitioner told Hicks to change the bills from Wilkinson Flying Service invoices to Central Rock

invoices. While the planes were indeed owned by Central Rock, it was normal practice to send flight bills on Wilkinson Flying Service invoices.

Petitioner also instructed Hicks to alter the dates on the bill which reflected when the flights supposedly occurred. He did not want the bill indicating the flights had occurred only one day apart. He said to make the flights a week apart starting with January 14. Petitioner told Hicks he did not want to know when the trips were actually taken. Petitioner did not comment when Hicks told him they occurred in December. Petitioner also instructed Hicks not to include Harper as a passenger on the new bills.

Pursuant to petitioner's instructions, Hicks made out new invoices with Central Rock's name and address. This was the first time she had ever sent out bills under Central Rock's name. She listed the dates of the two flights as January 14 and 20. She also left

Harper's name off the passenger list. She mailed the bills to petitioner at the Finance Cabinet. They were processed and subsequently forwarded to Military Affairs. All Kentucky government charter flights are paid for through Military Affairs and then inter-accounted to the appropriate agency.

Before Military Affairs approves a flight, however, an agency must file a flight request. These forms had not been submitted by the Department of Agriculture. Hank Lindsay, the Director of Air Transport for Military Affairs, made several attempts to obtain the proper forms from the Department of Agriculture. After having no success, he relayed this fact to Adjutant General Michael Davidson. Lindsay also expressed concern to Davidson that Wilkinson Flying Service might be involved with the bills.

Davidson called Burnette. Burnette promised Davidson the proper forms would be

sent.[1] Even though they talked about the dates of the flights, Burnette never revealed to Davidson the actual dates of the flights. Davidson also called Cooper Hartley at Central Rock. Hartley assured Davidson no money was going to Wilkinson Flying Service. Davidson was not aware the invoices had been changed. Davidson presumed the two issues had been resolved and approved payment of the bill. On April 25, 1988 the Department of Military Affairs issued a $5,435.79 check to Central Rock in payment for the two flights. Military Affairs then sent an inter-account bill to the Department of Agriculture requesting reimbursement for the money.

Bennett received the inter-account bill at the Department of Agriculture. She processed it like any other inter-account and gave it to Wolf for his signature. Wolf authorized a

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[1]Even though Burnette promised to send the proper forms, at the time of trial Davidson still had not received the forms from Burnette.

transfer of funds from the Agriculture Department to reimburse Military Affairs.

During an annual audit, William Smith, a financial officer and personnel branch manager for the Kentucky Department of Agriculture, discovered the invoice. Smith thought the bill looked questionable. Smith looked at Burnette's calendar to check the dates of the flights. Burnette's calendar indicated he was in Hopkinsville on January 14 and Atlanta on January 20. Smith questioned Burnette about the bill. Burnette told him to contact Military Affairs and get back their money.

Smith wrote several memos to Budget Finance Officer Hubert Payton and Ed Ross of Accounts at Military Affairs. Smith maintained no flights had occurred on the dates listed on the bill and as such, the Department of Agriculture had erroneously been billed. Payton called Smith and indicated to him everything appeared to be in order.

Payton called Bennett to inquire why he was receiving the memos from Smith. When Bennett went to pull the inter-account from the file, it was gone. Bennett told Wolf of her conversation with Payton. Wolf stated the matter would be taken care of and he did not want Bennett involved any longer.

About a week later, Payton called Bennett a second time saying he had received another memo. She told Wolf about this second conversation and he again ordered her to "stay out of it."

Because of what he believed were illegal activities at the Department of Agriculture, John Moore and another employee contacted the press and the state police. The two plane flights were specifically mentioned. After the issue of the flight dates became public, Adjutant General Davidson suspended the Department of Agriculture's flight privileges.

Petitioner, Burnett, Wolf and Bruce Harper were indicted by a Franklin County Grand Jury

for complicity to theft by deception. Burnette was indicted for theft by deception.

Petitioner, Wolf and Burnette were subsequently convicted of the charges against them. Petitioner was fined $2,500. Wolf and Burnette were fined $5,000. Harper was found not guilty.

The Kentucky Court of Appeals reversed appellees' convictions. The Court of Appeals held the Commonwealth failed to prove it relied on any deception on the petitioner or his co-defendants part when it paid the airplane flight bills. Respondent subsequently requested the Kentucky Supreme Court to grant discretionary review of the decision of the Court of Appeals, The Kentucky Supreme Court granted discretionary review and reversed the decision of the Court of Appeals, reinstating petitioner and his co-defendants' convictions. The Kentucky Supreme Court denied petitioner's petition for rehearing.

REASONS FOR DENYING THE WRIT

THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE KENTUCKY SUPREME COURT BECAUSE PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL CLAIM.

Section 1257(a) of Title 28, United States Code states a final judgment of the highest court of a State may be reviewed by this Court by writ of certiorari:

> where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner has not met this burden in any of the three issues on which he requests this Court to grant review.

1. Petitioner did not raise a federal issue in the Kentucky Supreme Court.

As stated above, petitioner's case was presented to the Kentucky Supreme Court pursuant to the Court's granting of

respondent's motion for discretionary review. Petitioner filed a brief in response to respondent's claims that the Kentucky Court of Appeals had erroneously reversed petitioner's conviction. In this brief petitioner did not assert any federal issue. Petitioner did not cite to the United States Constitution, any federal statute or any federal caselaw. Petitioner, therefore, has waived any federal issue which might be addressed in his case. Beck v. Washington, 369 U.S. 541, 553 (1962); 28 U.S.C. §1257(a).

2. Petitioner's Due Process Claim does not Invoke Jurisdiction of this Court.

In his first issue, petitioner claims he was denied "due process of law when he was convicted of complicity to theft by deception where the evidence was insufficient to prove these offenses beyond a reasonable doubt." (Petition pages 13-14.) This vague statement does not invoke jurisdiction of this Court pursuant to 28 U.S.C. 1257(3). In Bowe v. Scott, 233 U.S. 658 (1914) this Court

succinctly rejected the notion that a claim of "without due process of law" complied with the mandates of 28 U.S.C. 1257(3). The Court opined:

> [I]t is settled that such an averment, making no reference to the Constitution of the United States and asserting no express rights thereunder, is solely referable to the state constitution, which in this instance, has a due process clause and affords no basis whatever for invoking the jurisdiction of this Court.

51 U.S. at 665. In the case sub judice, Section 11 of the Kentucky Constitution does in fact contain a due process clause. See: Davenport v. Commonwealth, Ky. 368 S.W.2d 327 (1963). This Court, therefore, should not grant jurisdiction to review petitioner's claim.

3. Petitioner's Separation of Powers Argument does not Invoke Jurisdiction of this Court.

In his second issue, petitioner claims the Kentucky Supreme Court's opinion "represents an encroachment into areas of administration

granted to the Executive Branch by the Kentucky Constitution and statutes." Petitioner further avers the opinion "represents a denial of petitioner Kelly's due process and equal protection right under the United States Constitution." Again, petitioner's argument does not invoke the jurisdiction of this Court.

Some affirmative showing must exist that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. Where this is not clearly indicated, especially because of the presence of an adequate nonfederal ground, jurisdiction is not proper. As noted in Harding v. Illinois, 196 U.S. 78 (1904):

> It is settled that this court, on error to a state court, cannot consider an alleged Federal question when it appears that the Federal right thus relied upon had not been, by adequate specification, called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause.

196 U.S. at 178. As held in Oxley Stave Co. v. Butler County, Missouri, 166 U.S. 648 (1897):

> The questions raised and decided in the state circuit court point altogether for their solution to the laws of the state, and make no reference whatever to the constitution or laws of the United States. Undoubtedly, this did not preclude the plaintiffs in error from raising the point in the supreme court of the state, if it was involved in the case as presented to that court.

166 U.S. at 711. As noted in Burt v. Smith, 203 U.S. 129 (1906):

> It is argued that the [state] Court of Appeals exceeded its functions under the Constitution of the State, and in that way denied the plaintiffs due process of law. We see no reason to think so, but with that question we have nothing to do.

The same reasoning precludes petitioner from raising his issue in the instant case. The question before the Kentucky Supreme Court was the authority of the State Finance Secretary to pay bills accrued to the Commonwealth. In deciding this issue, the

Kentucky Supreme Court based its decision solely on the state constitution and state statutes. Nowhere in the opinion does the Kentucky Supreme Court address any portion of the United States Constitution or of any federal statute. (See Opinion of the Kentucky Supreme Court contained in Petitioner's Appendix, 1a-10a.) This Court, therefore, should not grant jurisdiction to review petitioner's claim.

4. Petitioner's Argument as to Justice Stumbo's Failure to Recuse herself does not invoke the Jurisdiction of this Court.

In his third issue, petitioner claims he was denied due process of law and equal protection when Kentucky Supreme Court Justice Stumbo failed to disqualify herself from petitioner's case. Again, petitioner's argument does not invoke the jurisdiction of this Court.

Petitioner initially raised this issue in a Petition for Rehearing filed with the

Kentucky Supreme Court after the Court's Opinion was rendered. Petitioner argued Justice Stumbo's failure to disqualify herself "represents a denial of the Appellees' equal protection and due process rights as protected under the United States Constitution." (See Petition for Rehearing contained in Petitioner's Appendix, 21a-31a.) The Kentucky Supreme Court summarily denied the petition for rehearing and stated "Justice Stumbo declines to recuse." (See Order contained in Petitioner's Appendix, 16a.)

However, raising a federal question for the first time in a petition for rehearing is insufficient to invoke the jurisdiction of this Court unless the state court actually entertains the petition and expressly decides the question. Herndon v. Georgia, 295 U.S. 441 (1935). Hanson v. Denckla, 357 U.S. 235, 243-244 (1958). To constitute a reviewable judgment, the order denying the petition for rehearing must be more than, as in the current

case, a cursory recitation that the petition has been considered and denied. McCorquodale v. Texas, 211 U.S. 432, 436-437 (1908).

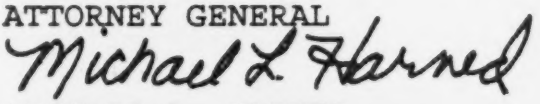
Petitioner claims he first realized this claim when the opinion was rendered with Justice Stumbo participating in the decision. This is still not sufficient to preserve any federal claim raised by petitioner. An exception to the above-stated rule regarding petitions for rehearing exist if the question is created by an unexpected decision of the state court. Herndon v. Georgia, 295 U.S. 441. In the present case, it cannot be said petitioner was surprised by the decision of the Kentucky Supreme Court. The issue raised by petitioner is not the result of a re-evaluation or new pronouncement of Kentucky law. Petitioner, therefore, cannot invoke this Court's jurisdiction by raising a claim pursuant to a petition for rehearing.

CONCLUSION

For the above-stated reasons the respondent respectfully submits that the Petition for Writ of Certiorari to the Kentucky Supreme Court should be denied. Petitioner has failed to invoke the jurisdiction of this Court.

Respectfully submitted,

CHRIS GORMAN
ATTORNEY GENERAL



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